IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-86

MCCLATCHY NEWSPAPERS, a corporation; ELEANOR MCCLATCHY; C. K. MCCLATCHY; BYRON CONKLIN; and CARLO BUA, *Petitioners,*

v.

WILLARD M. NOBLE and ETTA M. NOBLE, *Respondents*

MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Newspaper Publishers Association (hereinafter "ANPA") respectfully moves this Court for leave to file the accompanying Brief Amicus Curiae in support of the Petition for Writ of Certiorari filed herein. The Petitioners have consented to ANPA's

filing of a Brief Amicus Curiae; the Respondents have declined to do so.

The American Newspaper Publishers Association is a non-profit membership corporation organized and existing under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,170 newspapers representing over ninety percent of the total daily and Sunday newspaper circulation and a portion of the weekly newspaper circulation in the United States.

The Sacramento Bee, The Fresno Bee, The Modesto Bee—all owned by Petitioner McClatchy Newspapers —and sixty other newspapers throughout the State of California hold membership in ANPA.

Concerned with matters of general significance to the profession of journalism and the newspaper publishing business, ANPA seeks to keep its members abreast of matters touching these concerns. In that regard, the Association's member newspapers, individually and through ANPA, are vitally interested in the basic issue presented herein. That issue is whether a publisher may utilize independent contractors as distributors, to each of whom the publisher unilaterally and vertically assigns a specifically designated area of primary responsibility. Over ninety percent of ANPA's member newspapers, including Petitioner McClatchy Newspapers, use that method of distribution. Its main lawful purpose is to assure speedy, orderly and non-duplicative widespread circulation of their daily newspapers, upon which their advertising revenue, the lifeblood of the newspapers, depends. Most ANPA member newspapers do not have the resources to use the alternatives of distribution through consignment, agency, or vertical integration with use of their employees and their own outlets.

As Amicus, ANPA desires to present to the Court, for its assistance, its views on the following substantial federal questions fully discussed in the attached Brief Amicus Curiae:

(1) Whether the Court of Appeals erred by interpreting the Court's rationale in *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), as automatically declaring illegal per se all vertical restraints on distribution after title and dominion passes in sales transactions, on which there have been conflicting decisions in both the Courts of Appeals and in the District Courts.

(2) Whether the Court of Appeals should have applied a Rule of Reason inquiry into the inherent unique characteristics which make the nature, purpose, functions and effects of the independent contractor distribution system of marketing daily newspapers radically different from the marketing of industrial products.

(3) Whether the Court of Appeals erred in applying the per se *Schwinn* rule without any consideration or finding that the termination of Respondents' distributorship, the conduct complained of, substantially affected interstate commerce.

On the foregoing issues this is an antitrust newspaper case of first impression.

WHEREFORE, American Newspaper Publishers Association respectfully requests this Court to grant this

Motion and permit the filing of the Brief Amicus Curiae attached hereto and submitted herewith.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

PRELIMINARY STATEMENT

American Newspaper Publishers Association (hereinafter "ANPA") submits this brief *amicus curiae* in support of Defendants McClatchy Newspapers, Eleanor McClatchy, C. K. McClatchy, Byron Conklin and Carlo Bua, in their Petition for Writ of Certiorari.

INTEREST OF THE AMICUS CURIAE

The American Newspaper Publishers Association is a non-profit membership corporation organized and existing under the laws of the Commonwealth of Virginia. Its membership consists of more than 1170 newspapers representing over ninety percent of the daily and Sunday newspaper circulation and a portion of the weekly newspaper circulation in the United States.

Three daily newspapers owned by Petitioner McClatchy Newspapers, as well as sixty other newspapers published throughout the state of California, hold membership in ANPA. Concerned with issues of general significance to the profession of journalism and the newspaper publishing business, ANPA seeks to keep its members informed of, and to provide meaningful input on, matters touching on these concerns.

In that regard, the Association's member newspapers, individually and through ANPA, are ever vigilant to safeguard the means of distribution of their newspapers. Distribution is aimed at promoting circulation upon which advertising patronage and advertising revenue, the lifeblood of a daily newspaper, depend. Among the journalistic press functions fostering the goal of the First Amendment is competition in the dissemination of news and advertising. These are services the public has the right to have while the information is of current significance. This time perishability of daily newspapers, as will be shown in detail *infra,* makes the speedy, orderly and efficient marketing of the daily newspapers indispensable to their economic survival.

ARGUMENT

The Court of Appeals' Decision and Opinion Erred in Misinterpreting This Court's Rationale in Schwinn as Automatically Declaring Illegal Per Se All Vertical Restraints on Distribution After Purchase and Sale Transactions.

In *Willard M. Noble and Etta M. Noble* v. *McClatchy Newspapers et al.,* 533 F.2d 1081 (9th Cir. 1975), *rehearing denied May 20, 1976,* the Court of Appeals held that McClatchy had imposed territorial restrictions upon the plaintiffs which the jury should have been instructed were per se unreasonable under the ruling of this Court in *United States* v. *Arnold, Schwinn & Co.,* 388 U.S. 365 (1967). Accordingly, the District Court's judgment for defendants was reversed. The case was remanded for a new trial on plaintiffs' claim that their distributorship was terminated, in substantial part, because plaintiffs refused to comply with defendants' request that they give up part of the territory covered by their distributorship.

One root error of the Court of Appeals was its failure to note that there was no record evidence from which the jury could have found that there was in fact an express or tacit territorial restriction in the contract between McClatchy and the Nobles. On its particular facts, the contract merely imposed on the distributor of McClatchy's Sacramento Bee, a daily evening and Sunday paper, the primary obligation to exert his best efforts to distribute the newspapers in a designated geographic area. This area was called "Newsstand 5", which covered a part of the city of Sacramento and suburban towns within twenty miles of Sacramento.

In substance and effect this vertical restraint was merely the designation of an "area of primary respon-

sibility" which has been sustained by federal courts against contentions that they are banned by *Schwinn's* illegal per se prohibition. In *GTE Sylvania, Inc.* v. *Continental T.V., Inc.,* 1976-1 Trade Cas. ¶ 60,848 (9th Cir. 1976), the majority opinion of the Court of Appeals, sitting *en banc,* defined an area of primary responsibility clause in footnote 25 as

> "... basically an agreement obligating a distributor to concentrate his sole efforts in a specified geographical area for which he is primarily responsible."

The majority cited the following cases as approving a primary responsibility clause, in which a seller's legitimate main purpose and interest is to have his goods or services distributed effectively within the designated area, so long as there is no added anticompetitive restraint: *Colorado Pump & Supply Co.* v. *Febco, Inc.,* 472 F.2d 637 (10th Cir. 1973), *cert. denied,* 411 U.S. 987 (1973); *Superior Bedding Co.* v. *Serta Associates,* 353 F. Supp. 1143 (N.D. Ill. 1972). The lawfulness of area of primary responsibility covenants has also been recognized in various consent decrees, *e.g., United States* v. *Bostitch, Inc.,* 1958 Trade Cas. ¶ 69,207 (D.R.I.), *United States* v. *Rudolph Wurlitzer Co.,* 1958 Trade Cas. ¶ 69,011 (W.D.N.Y.), cited by Justice Brennan in his concurring opinion in *White Motor Co.* v. *United States,* 372 U.S. 253 at 272, n. 12. The final decree in *Schwinn* sanctioned areas of primary responsibility and permitted *Schwinn* to terminate distributors who fail adequately to represent *Schwinn* in their designated area, 291 F. Supp. 564, 565-66 (N.D. Ill. 1968).

In *McClatchy,* the Nobles were not restrained from selling the Sacramento Bee to any potential purchaser

located outside the designated Newsstand 5 area or who might come into that area. The Court of Appeals in *McClatchy* nevertheless cryptically said "There is no magic in the label 'area of primary responsibility'." 533 F.2d at 1089. This unwarranted disregard of the substance of such a lawful covenant stems from the court's literal application of the language in *Schwinn* that once a seller parts with title and dominion over his product, the illegal per se rule automatically condemns all vertical restraints.

Furthermore, McClatchy acted unilaterally in contracting with the Nobles and each of its other distributors in assigning specified geographic areas of primary responsibility. There was no element of combination or conspiracy or any horizontal illegal per se restraint. Nor was there any evidence of anticompetitive purpose or effect.

In *GTE Sylvania, Inc.* v. *Continental T.V., Inc., supra,* the majority Court of Appeals, sitting *en banc,* reversed the District Court which literally applied the illegal per se rule of *Schwinn* to a "location clause" in a franchise agreement. The majority held that the confinement of authorized franchisees to specified locations should have been considered by the jury under a rule of reason instruction.

Your Amicus perceives no difference in either the effect or in the main lawful purpose of a location clause and an area of primary responsibility clause, as used in *McClatchy.* In both types of clauses, the independent distributor or dealer is not prevented from selling to customers elsewhere. A location clause merely requires such sales to be made from an authorized outlet. The Final Decree in *Schwinn* permitted

designation of the location of the place of business for which the franchise is issued. 291 F. Supp. 564, 565-66 (N.D. Ill. 1968).

While your Amicus concurs in the majority's decision in *GTE*, we are puzzled by the majority's statement that it has no quarrel with the result reached by the same circuit's panel in *Noble* v. *McClatchy,* supra, which applied the per se rule of *Schwinn* by ignoring the difference between a naked territorial restriction forbidding sales to customers outside the territory and an area of primary responsibility. That error applies to both area of primary responsibility and location clauses and the rule of reason therefore should also have been applied in *McClatchy*. Perhaps that explains why the majority in *GTE* disapproved any language in *McClatchy* inconsistent with the majority's language in *GTE*. Nonetheless, your Amicus believes there is inconsistency in both the result and language between the *GTE* majority and *Noble* v. *McClatchy*.

The Court of Appeals Should Have Applied a Rule of Reason as the Only Appropriate Approach to an Inquiry into the Nature, Purpose, Functions and Effects of the Independent Distributor System of Marketing Daily Newspapers.

The basic position of your Amicus is that there are inherent unique differences between the publishing business related to the distribution of daily newspapers and the marketing of products or services of industrial enterprises. This question is of vital importance to ANPA member newspapers, over ninety percent of whom distribute their daily newspapers through small independent entrepreneurs. Your Amicus therefore presents for the consideration and assistance of this Court an analysis of the factors involved in that method

of marketing newspapers. This will reveal that the radically different facts of *Schwinn* are inapplicable to the distribution of daily newspapers.

Time Perishability of Daily Newspapers

A daily newspaper is unique in the fleeting time its news and advertising information remain current. It is therefore of paramount importance that the distribution of daily newspapers be timely made. A morning daily newspaper must be delivered to home subscribers before the conventional breakfast hour. The papers must also be on the newsstands and in retail outlets before people go to work. The evening newspapers likewise must be available on the newsstand and in retail outlets before the evening rush hours and delivered to home subscribers before dinner.

These built-in deadlines for the delivery of daily newspapers are radically unlike the marketing of industrial commodities. A daily newspaper is not a "commodity". This has been judicially recognized by the courts. The historic lineage of this view is attested by *Casey* v. *Male*, 72 N.J. Super. Ct. 288, 178 A.2d 249 (1962). The court there quoted *In re Capitol Publishing Co.*, 3 MacArthur 405 (D. Colo. 1877), to support its holding that a newspaper publisher's facility was not "a factory, workshop, mill or place where manufacture of goods is carried on." The court then quoted the following:

> "A newspaper has intrinsically no value above that of an unprinted sheet. Indeed, it has less value, considered intrinsically, as a mere article of merchandise. Its value to subscribers arises from the information it contains, and its profit to the publisher is derived, in great measure, from the advertising patronage it obtains by reason of the

> circulation of the paper induced by the enterprise and ability with which it is conducted. Neither in the nature of things, nor in the ordinary signification of the language, would a newspaper be called a manufactured article or its publisher a manufacturer."

Accord: State v. *Crouse,* 105 Neb. 672, 181 N.W. 562 (1921); *Advertiser Publishing Co.* v. *Fase,* 279 F.2d 636 (9th Cir. 1960).

Unlike industrial commodities, newspapers have no inventory stored for later sale. In sum, time perishability, deadlines in press runs, and timely delivery of daily newspapers are the realities of a newspaper distribution system. The added costs, burdens and risks incurred thereby are unique to the publication and dissemination of daily newspapers.

It is noteworthy that the Court of Appeals in *McClatchy* completely failed to comprehend the foregoing unique features of newspaper distribution. *Schwinn* and every case cited by the Court of Appeals except *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968), had involved commodities. *Albrecht* is inapplicable because the St. Louis Globe-Democrat was found to have formed a combination with two other persons to force Albrecht to adhere to the newspaper's suggested maximum prices for the resale of the papers purchased by Albrecht from the Globe-Democrat, a question not in issue here. In *Albrecht,* the Court's reference to *Schwinn* was mere dictum.

In *McClatchy*, the Court of Appeals cited two beer distribution cases as rejecting the argument that speedy delivery of perishable products justified an exception to the *Schwinn* per se rule. *Adolph Coors Co.* v. *FTC,*

497 F.2d 1178 (10th Cir. 1974); *Fairfield County Beverage Distributors, Inc.* v. *Narragansett Brewing Co.,* 378 F. Supp. 376 (D. Conn. 1974). This further shows that the court was not cognizant of the fundamental differences between the marketing of commodities and the distribution of daily newspapers.

While constantly referring to "manufacturers" and "products", the Court of Appeals, addressing itself also to the distribution of daily newspapers in *McClatchy*, curiously stressed that there was "a significant incentive" to distribute through independent contractors as against the alternatives of marketing through employees, agents or consignees. The court said that "Use of independent distributors avoids the substantial investment, expense, and risk incident to alternative methods of distribution." 533 F.2d 1088-1089. Yet the practical advantages of the independent distributor method of distributing daily newspapers were swept under the cloak of the court's literal and mechanical interpretation of *Schwinn* as requiring publishers who use independent distributors "to accept the burdens of *Schwinn.*" *Id.* at 1088.

This indiscriminate application of *Schwinn* to all vertical restraints after title passes to the purchaser offers a Hobson's choice to the vast majority of ANPA member newspapers which utilize the independent distributor system. Only a few have the resources to convert their independent distributor method of distribution by vertical integration into a system of distribution through employees and their own outlets. Equally infeasible to most ANPA member daily newspapers would be conversion to an agency or consignment method of distribution, to be judged under

Schwinn by a "rule of reason" approach. *See* 533 F.2d at 1088 n. 19.

This brings us to a pivotal fact unique to the newspaper publishing business. In *Times-Picayune Publishing Co.*, v. *United States*, 345 U.S. 594 at 604 (1953), this Court took note of one of the fundamental realities of the newspaper publishing business in observing that

> "Advertising is the economic mainstay of the newspaper business . . . . Obviously newspapers must sell advertising to survive . . . ."

It is empirically established that usually seventy to eighty percent of the revenues of a daily newspaper are derived from advertising. See, for example, *Editor & Publisher*, April 6, 1963 at 15.

More important to an understanding of a daily newspaper's distribution system is the immutable interrelation between the volume of circulation of a newspaper and its advertising revenue. This unique behavioral characteristic is accentuated by the fact that the circulation volume generally establishes the value of the newspaper to advertisers whose patronage is directed toward a large readership among consumers of the advertised products or services. The bulk of the daily newspaper's advertising revenue is derived from local retail display advertising and local classified advertising. This has direct relevance to the local services of a newspaper's independent distributors whose functions in their respective areas of primary responsibility are essential to maintaining widespread circulation within their local submarkets.

In *Citizen Publishing Co.* v. *United States*, 280 F. Supp. 978 (D. Ariz. 1968), *aff'd*, 394 U.S. 131 (1969), the District Court at 985 set forth in Finding 68 the

interlock between circulation volume and advertising revenue in the following realistic terms:

> "The quality, circulation, and advertising revenues of a newspaper are interrelated. Generally, as the quality of a newspaper improves it receives wider public acceptance and its circulation increases. As the circulation increases, the newspaper becomes more attractive to merchants as an advertising medium and advertising revenues consequently increase. The increased revenues, in turn, enable the publisher to increase his expenditures on the news and editorial staff, wire services, and syndicated features and otherwise improve the quality of the newspaper. As a corollary to this process, it is to be expected that if the quality of the newspaper falls, there will be a loss of circulation to other publications, which will adversely affect newspaper advertising revenues, and a decline in advertising revenues will further adversely affect the quality of the newspaper, resulting in a further decline in circulation."

It is readily seen that an orderly, timely and nonduplicative distribution through independent distributors, in addition to the efficiency of direct cost savings, increases the local market penetration of the daily paper throughout its Retail Trading Zone.

This is a case of first impression. In no prior antitrust newspaper case has this Court had to determine whether the commercial operations pertaining to the independent distributor method of marketing daily newspapers requires a rule of reason approach to adjudication.

In our view the basic substantive issue in *McClatchy* merits reiteration. It is the legality of a vertical designation, by unilateral action of the newspaper publisher, of areas of primary responsibility, ancillary to

the main lawful purpose of assuring timely, orderly and quality service of delivery of newspapers, which, so to speak, are alive only on the day they are circulated.

The unique behavioral characteristics of daily newspaper marketing, which your Amicus has analyzed, make the illegal per se rule of *Schwinn* on territorial restraints after sale as inappropriate in *McClatchy* as it was in *White Motor Co.* v. *United States,* 372 U.S. 253 (1963). There Justice Douglas' majority opinion declared that the rule of reason was read into the Sherman Act as a rule of construction in the landmark opinion of this Court in *Standard Oil Co. of New Jersey,* 221 U.S. 1 (1911). That standard of reasonableness, the Justice said, "normally requires ascertainment of facts peculiar to the particular business." *White Motor* was also a case of first impression involving a territorial restriction about which the Court said it knew too little of its actual impact to condemn the practice as illegal per se.

This Court is so familiar with the historic common law roots of the reasonable ancillary restraints doctrine as an integral part of the rule of reason that your Amicus merely outlines the evolution of relevant judicial precedents. The distinction between vertical restraints ancillary to a main lawful purpose and non-ancillary horizontal restraints, which this Court has frequently and properly condemned as, by nature, conclusively presumed to be unreasonable per se, was first formulated by Chief Justice Taft (then Circuit Judge) in *United States* v. *Addington Pipe & Steel Co.,* 85 Fed. 271 (6th Cir. 1898), *aff'd,* 175 U.S. 211 (1899). Indeed, as Justice Stewart pointed out approvingly, in his opinion concurring in part in

Schwinn, as early as 1711, *Mitchell* v. *Reynolds,* 1 P. Wms. 181, 24 Eng. Rep. 347, recognized the legality of restraints on alienation that are ancillary to a legitimate business purpose. The passage in the notable opinion of Justice Brandeis in *Chicago Board of Trade* v. *United States,* 246 U.S. 231 at 238 (1918), setting forth the pertinent criteria governing the judicial technique of applying the rule of reason, has been frequently quoted by this Court. Among those criteria directly relevant here are "consideration of the facts peculiar to the business in which the restraint is applied, the nature of the restraint and the reasons for its adoption."

Nothing in this Amicus brief is intended to question this Court's repeated condemnation of the classic illegal per se horizontal agreements, combinations and conspiracies for which no justification can be shown. See, for example, Justice Black's opinion in *Northern Pacific Ry. Co.* v. *United States,* 356 U.S. 1 at 5 (1958), and the horizontal arrangement recently proscribed in *United States* v. *Topco Associates, Inc.,* 405 U.S. 596 (1972). This Court has not receded from that position. The record evidence in *McClatchy,* however, reveals that the vertical designation of areas of primary responsibility does not have a "pernicious effect on competition". On the contrary, it has the redeeming value of enabling the small independent newspaper distributors to survive. This Court has recognized Congress' intent to preserve the independent businessman. See *United States* v. *Von's Grocery Co.,* 384 U.S. 270, 275 (1966); *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 344 (1972); *Standard Oil Co.* v. *United States,* 337 U.S. 293, 315-321 (1949). Your Amicus notes that the promotion of the self-interest of the newspaper and its

distributors or dealers do not alone immunize otherwise illegal conduct. Here, however, the record evidence does not reveal anticompetitive purpose or effects on the market.

This Court has not shrunk from applying the rule of reason approach merely because it requires an extended inquiry into the economic impact of a practice attacked as a violation of the Sherman Act. Apart from the horizontal arrangements conclusively presumed to be unreasonable per se, this Court has shown that it is equipped to undertake the task of weighing the various factors involved in a rule of reason approach in a case-by-case determination. In the newspaper publishing business, a per se illegality rule would be contrary to the policy of the Sherman Act. It would be completely at odds with the realities of the market behavior of daily newspaper distribution and the commercial and press functions it performs for the benefit of the readership.

The effect of the decision of the Court of Appeals in *McClatchy* being permitted to stand, namely, outlawing the independent contractor distribution of newspapers, would have devastating results in the daily newspaper publishing field. The system has been used by the great majority of daily newspaper members of ANPA over many decades. For most of these newspapers there are no feasible alternatives. Outlawing the system would ban the legitimate commercial objectives of preserving widespread local circulation, and its concomitant, necessary advertising revenues of daily newspapers. It would as well imminently and irreparably deprive the independent distributors of their customary way of earning a livelihood.

The Court of Appeals Erroneously Applied the Per Se Rule of *Schwinn* in the Absence of Any Consideration or Finding that the Termination of the Respondents' Distributorship Affected Interstate Commerce.

Your Amicus supports Petitioners' argument that the Commerce Clause of Section 1 of the Sherman Act required a finding that the termination by McClatchy of Noble's distributorship, the conduct complained of, substantially affected interstate commerce.

Interstate commerce is a jurisdictional requirement related to the subject matter of this suit. It is an issue that may be considered for the first time in the Court of Appeals, or in this Court, even if it was not, as Respondents erroneously assert, raised before the District Court. An objection to jurisdiction of the subject matter goes to the basic question of the power of a court to hear and decide a case, as duly authorized by statute. Lack of jurisdiction is a defense that cannot be waived by either party or ignored by the court. In *Rock Island Millwork Co.* v. *Hedges-Gough Lumber Co.*, 337 F.2d 24, at 27 (8th Cir. 1964), the court said: "The appellate court must satisfy itself not only of its own jurisdiction but also that of the district court".

As pointed out by Petitioners (see Petition pp. 16-17), the Court of Appeals in *McClatchy* regarded its application of the per se *Schwinn* rule as dispensing with the need for considering the jurisdictional requirement of interstate commerce.

As noted, Respondents erroneously state that the issue of interstate commerce was not raised in the court below. See Brief for Respondents in Opposition, pp. 14-18. To the contrary, Petitioners raised and briefed that issue by interposing it in opposition to the Re-

spondents' Claim Three: the sale of business claim, on which the Court of Appeals reversed judgment for Respondents. Petitioners' argument on the interstate commerce question was also addressed to the Respondents' claim that termination of their distributorship violated Section 1 of the Sherman Act.

Jurisdictionally, Section 1 of the Sherman Act comprehends only restraints "among the several states". There must be a sufficient nexus between the conduct complained of and interstate commerce. Two tests are generally enunciated in this Court and in lower federal courts. One is whether the restraint covers conduct within the flow of interstate commerce—the "in commerce" test. The other is whether the restraint involved conduct in itself wholly intrastate which nevertheless substantially affects interstate commerce.

Your Amicus recognizes that this Court, in certain newspaper antitrust cases under the peculiar facts of those cases, has held that where the commercial operations of daily newspapers involve complained of conduct, that conduct is an inseparable part of the flow of interstate commerce. Thus, for example, the combination or unit advertising rate of the newspaper, upheld in *Times Picayune Publishing Co.* v. *United States, supra,* was in the flow of interstate commerce of the paper. In *Albrecht* v. *Herald Co.,* 490 U.S. 145 (1968), where the majority of the Court held there was an unlawful combination to control the resale price of the paper, that conduct was also found to be inseparable from the interstate commerce of the paper. In *Lorain Journal Co.* v. *United States,* 342 U.S. 143 (1951), the Lorain Journal refused to sell advertising to local merchants who advertised through a nearby radio station. The

Court held this was predatory conduct by the Lorain Journal, designed to drive the radio station out of business. Under this "in commerce" test, the amount of commerce in dollars or the percentage share of the market is not dispositive. Under the "affecting commerce" test, however, the wholly local or intrastate conduct must be shown to have a substantial effect on interstate commerce.

In *Page* v. *Work,* 290 F.2d 323 (9th Cir. 1961), *cert. denied,* 368 U.S. 875 (1961), the Court of Appeals held it was without jurisdiction because the legal advertising in the newspaper there involved was purely local, and directed wholly to a local intrastate market. The court announced a basic distinction in the test of jurisdiction, stating at 330:

> "The test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, *but that the conduct complained of affects the interstate commerce of such business.*" (Emphasis added.)

Nothing in this Court's unanimous ruling and opinion in *Hospital Building Co.* v. *Trustees of Rex Hospital et al.,* 1976-1 Trade Cas. ¶ 60,885 (1976), precludes a case-by-case determination on the commerce issue on the particular facts. It is especially important that the Court in footnote 9 said:

> "It may of course be that even though petitioner's complaint adequately alleges an effect on interstate commerce, further proceedings in this case will demonstrate that respondents' conduct involves no violation of law, or indeed no substantial effect on interstate commerce. Cf. *United States* v. *Oregon Medical Society,* . . . 343 U.S. 326 (1952)."

In *Oregon Medical,* the Court held that furnishing health insurance by a state-wide society of doctors was not interstate commerce for purposes of the Sherman Act.

The caveat in the quoted footnote 9, *supra,* in *Rex Hospital* is in keeping with the Court's admonition in *Maple Flooring Mfrs. Ass'n* v. *United States,* 268 U.S. 563, at 579-580 (1925) that

> ". . . each case arising under the Sherman Act must be determined upon the particular facts disclosed by the record, and that the opinions in those cases must be read in the light of their facts and of a clear recognition of the essential differences in the facts of those cases, and in the facts of new cases to which the rule of earlier decisions is applied."

In *Rex Hospital* the facts are radically different from those in *McClatchy.* The holding in *Rex Hospital* was that, on respondents' motion to dismiss the complaint of Hospital Building, a fair reading of the complaint adequately alleged a restraint of trade substantially affecting interstate commerce. A dismissal on the pleadings was therefore held inappropriate.

Rex Hospital's motion to dismiss the complaint was made under Rule 12(b)(6) of the Federal Rules of Civil Procedure for plaintiff's failure to state a claim on which relief could be granted. This Court in footnote 1 of its opinion said:

> ". . . However, our analysis of the case would be no different, if we were to regard the District Court's action as having been a dismissal for want of subject matter jurisdiction under Rule 12(b)(6). In either event, the critical inquiry is into the adequacy of the nexus between respondents' conduct and interstate commerce that is alleged in the complaint."

This Court's opinion in *Rex Hospital* reveals that a "concededly rigorous standard" was applied to motions to dismiss a complaint preliminary to discovery or to a trial on the merits. In such circumstances, it is understandable that the Court took a broad view of the Congressional power over interstate commerce under the Sherman Act. That is why in cases cited by the Court the local business restraints were held to produce substantial adverse effects on interstate commerce. See *United States* v. *Employing Plasterers Ass'n,* 347 U.S. 186 (1954); *United States* v. *Women's Sportswear Mfrs. Assn.,* 336 U.S. 460 (1949), cited by the Court among other like factual situations. In *Rex Hospital* the Court added that the effects of a restraint may be indirect and not "purposely directed" toward interstate commerce. It further stated that the lack of effect on price is not of great relevance and that the impact on interstate commerce may fall "far short of causing enterprises to fold or affecting market price".

It should be kept in mind that in *McClatchy* there was a trial before the District Court, with a jury instructed by the court, followed by cross-appeals to the Court of Appeals. The material facts of *McClatchy* are also entirely different from those taken as true by this Court in *Rex Hospital,* in reviewing a dismissal on the pleadings.

Your Amicus now turns to the particular facts of *McClatchy* related to the termination of the Respondents' distributorship. The Sacramento Bee, as in the case of daily ANPA member newspapers generally, was itself engaged in interstate commerce. In the typical

situation, a daily newspaper uses news services such a AP or UPI, purchases newsprint and other supplies originating outside the state, and contracts for syndicated features, comics, and the like that come from outside the state. Respondents' termination claim, however, the very conduct complained of, relates *solely to the line of commerce* in the purely local distribution by Noble of the Bee in the specified geographic area called Newsstand 5. That is the only relevant submarket involved in the termination claim.

After the termination issue was tried in the District Court and on cross-appeals, the Court of Appeals ignored the jurisdictional issue of interstate commerce. This it did on the erroneous assumption that application of the per se illegality rule of *Schwinn* automatically coalesced and equated the issue of violation with an unreasonable per se restraint in interstate commerce. The Court of Appeals neither considered nor made a finding on interstate commerce as a jurisdictional requirement.

The record evidence in *McClatchy* shows that the termination of Respondents' distributorship had no effect at all on the interstate commerce of the Sacramento Bee. Therefore, the termination could not have had any substantial adverse effects on the newspaper's interstate commerce. On termination of Respondents' distributorship, *McClatchy* immediately and unilaterally split the Newsstand 5 area, and assigned a designated part to each of two independent distributors in individual vertical relations with each of them.

Neither of the new distributors had any connection with the termination of Respondents' distributorship. Each of them voluntarily and individually accepted the

area of primary responsibility offered him after termination of the Respondents' distributorship. Furthermore, no combination or conspiracy can be sustained against McClatchy acting unilaterally because of the prevailing view in *Nelson Radio & Supply Co.* v. *Motorola Inc.*, 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953). *Nelson Radio* holds that a corporation cannot conspire with itself, and can act only through its officers, agents or employees in the management and control of its business. Among the defendants named in Respondents' complaint are two employees and three officers of McClatchy Newspapers. They clearly cannot be deemed conspirators under *Nelson Radio*. The defendants Downing and Gallagher, the new distributors, were also not conspirators because they contracted with McClatchy after Respondents were terminated. They had no connection whatsoever with the disputed termination.

The Sacramento Bee was distributed by independent distributors only within the State of California. The commerce involved with respect to the conduct complained of by Respondents was therefore purely local as in *Page* v. *Work, supra* and in *Sun Valley Disposal Co.* v. *Silver State Disposal Co.*, 420 F.2d 341 (9th Cir. 1969). The distribution of the Bee continued after termination of the Respondents' distributorship as before the termination except that the specified geographic area was split between the two new distributors. That wholly local distribution had no effect, and clearly no substantial effects, on any of the Bee's interstate commerce in newsprint, ink or any other products or services originating outside the State of California.

It is therefore irrelevant to the Respondents' claim of unlawful termination what constitutes the relevant

submarket of the Sacramento Bee. If that were relevant, your Amicus would support the position that the daily newspaper constitutes a submarket distinct from the broadcast media. This was the holding in *Citizen Publishing Co.* v. *United States,* 280 F. Supp. 978 (D. Ariz. 1968), *aff'd,* 394 U.S. 131 (1969), and *United States* v. *Times-Mirror Co.,* 274 F. Supp. 606 (D. Cal. 1967), *aff'd per curiam,* 390 U.S. 712 (1968). Our analysis shows that the submarket of the Bee involving interstate commerce is totally irrelevant because the only line of commerce involved on the termination is the wholly local distribution of the Bee in the local Newsstand 5 area originally designated for Respondents and later split within the same designated area for the new distributors replacing Respondents.

Your Amicus sees no need for burdening this Court with repetition of the circumstances related to the termination of Respondents' distributorship set forth by Petitioners, which your Amicus adopts and supports. Suffice it to add that, in the absence of any element of anticompetitive purpose or effect, or any other conduct violative of the Sherman Act, the termination of the Respondents' distributorship falls squarely within *United States* v. *Colgate & Co.,* 250 U.S. 300 (1919). There the Court announced its landmark ruling of the long recognized right of a private business firm to select, by free exercise of its independent discretion, the persons with whom it chooses to deal, or continue to deal, for business reasons sufficient unto itself. That is precisely the right exercised by McClatchy Newspapers in terminating Respondents' distributorship. *See Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.,* 416 F.2d 71 (9th Cir. 1969), *cert. denied,* 396 U.S. 1062 (1970); *Ricchetti* v. *Meister Brau,*

Inc., 431 F.2d 1211 (9th Cir. 1970), *cert. denied,* 401 U.S. 939 (1971); *Bushie* v. *Stenocord Corp.,* 460 F.2d 116 (9th Cir. 1972).

Furthermore, the termination was made pursuant to the provision in the contract between McClatchy and Respondents, that the distributorship "may be cancelled by either party at any time upon thirty days prior written notice to the other party". McClatchy gave the Respondents the required notice of cancellation by letter thirty days prior to that termination.

In the role of an amicus, we also felt it was not necessary to discuss cases revealing the conflict in both the Circuit Courts of Appeals and among the District Courts regarding the per se rule pronounced in *Schwinn* and set forth in the Petitioners' brief.

For the reasons stated herein, it is respectfully urged that this Court grant the Petition for Writ of Certiorari in order that the substantial federal questions of antitrust law raised therein and herein be fully examined and adjudicated.

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